

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHERYL HOLLAND,

Defendant.

NO. CR-02-149-RHW

**ORDER DISMISSING AMENDED
MOTION TO VACATE
SENTENCE UNDER 28 U.S.C. §
2255; DENYING MOTION TO
APPOINT COUNSEL IN 28 U.S.C.
§ 2255 PETITION**

Before the Court are Defendant's Amended Motion to Vacate Sentence Under 28 U.S.C. § 2255 (Ct. Rec. 63) and Motion to Appoint Counsel in 28 U.S.C. § 2255 Petition (Ct. Rec. 64). In her Amended Motion, Defendant contends that, pursuant to *United States v. Booker*, 543 U.S. 220 (2005), her sentence violated her Sixth Amendment rights, and asks that her sentence be vacated, and that she be re-sentenced in accordance with the Constitution. Defendant also asserts that her counsel rendered her ineffective assistance in violation of the Sixth Amendment.

BACKGROUND

Defendant was charged with and plead guilty to Conspiracy to Possess Red Phosphorus with Intent to Distribute, in violation of 18 U.S.C. § 846. On February 14, 2003, the Court sentenced her to 108 months imprisonment, 3 years supervised release, and a \$100 special penalty assessment. Defendant appealed her sentence to the Ninth Circuit, which summarily affirmed the judgment. She petitioned for a writ of certiorari to the United States Supreme Court, which was denied on October

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1 4, 2004.

2 In sentencing Defendant, the Court looked to analogous guidelines because
3 there were no Guideline provisions for possession with intent to distribute red
4 phosphorus and determined that her offense level was 14. The Court then upward
5 departed by 16 levels because the Court determined that it was not a "heartland"
6 case in that the type of material and the quantity of material were not accounted for
7 in the analogous guideline.

8 DISCUSSION

9 A federal prisoner, under 28 U.S.C. § 2255, may move the court to vacate,
10 set aside or correct a sentence on the grounds that (1) the sentence imposed was in
11 violation of the Constitution or laws of the United States; (2) the court lacked
12 jurisdiction to impose such a sentence; or (3) that the sentence exceeded the
13 maximum authorized by law. Unless the motion, files, and records conclusively
14 show the prisoner is not entitled to relief, the court shall cause notice to be served
15 upon the United States Attorney, grant a prompt hearing, determine the issues, and
16 make findings of fact and conclusion of law. 28 U.S.C. § 2255. If it is plainly
17 apparent that the petitioner is not entitled to relief, however, pursuant to Rule 4(b),
18 Rules Governing Proceedings in the United States District Courts, the court may
19 voluntarily, *sua sponte*, dismiss the motion.

20 A. Violation of Sixth Amendment Right to Trial

21 Defendant argues that her sentence violated her Sixth Amendment right to
22 trial, relying on *United States v. Booker*, *United States v. Ameline*,¹ and *United*
23 *States v. Kortgaard*.²

24 In *United States v. Cruz*, 423 F.3d 1119 (9th Cir. 2005), the circuit held that
25 *Booker* did not apply retroactively to convictions that became final prior to its

26 ¹409 F.3d 1073 (9th Cir. 2005).

27 ²425 F.3d 602 (9th Cir. 2005).

1 pronouncement. *Id.* at 1121. In this case, Defendant's conviction became final on
2 October 4, 2004, and *Booker* was decided on January 12, 2005. To the extent
3 Defendant relies on *Booker* and subsequent cases to challenge her sentence, she is
4 not entitled to relief.

5 Defendant also argues that possession of red phosphorus, knowing or having
6 reasonable cause to believe that it would be used to manufacture methamphetamine
7 is not a federal crime. Defendant argues that because red phosphorus is not listed
8 in 21 U.S.C. § 802(34), it is not a list I chemical. Although Defendant is correct
9 that red phosphorus is not listed in 21 U.S.C § 802(34), the section does not
10 profess to be an all-inclusive listing of all List I chemicals. The statute provides:

11 “The term “list I chemical” means a chemical specified by
12 regulation of the Attorney General as a chemical that is used in
13 manufacturing a controlled substance in violation of this subchapter
14 and is important to the manufacture of the controlled substances, and
15 such term includes (until otherwise specified by regulation of the
16 Attorney General or upon petition to the Attorney General by any
17 person) the following: . . .

18 21 U.S.C. § 802(34).

19 The statute goes on to list certain chemicals, and red phosphorus is not
20 listed. This is not dispositive, however. The term “includes” indicates that
21 Congress did not intend for the statute to set forth an all-inclusive list. *See Federal*
22 *Trade Comm’n v. MTK Mktg., Inc.*, 149 F.3d 1036, 1040 (9th Cir. 1998) (“[i]n
23 terms of statutory construction, use of the word ‘includes’ does not connote
24 limitation. In definitive provisions of statutes and other writings, ‘include’ is
25 frequently, if not generally used as a word of extension or enlargement rather than
26 as one of limitation or enumeration.”) (citation omitted).

27 Consequently, on October 17, 2001, the Drug Enforcement Administration
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1 issued a Final Rule that added red phosphorus to the List I chemicals. Control of
2 Red Phosphorous, White Phosphorus and Hypophosphorous Acid (and its salts) as
3 List I Chemicals, 66 FR 526701 (Oct. 17, 2001). As of November 16, 2001, the
4 effective date of the final rule, red phosphorus is a List I chemical. *Id.*; *see also* 21
5 C.F.R. § 1310.02(a). Because Defendant was indicated on June 4, 2002, well after
6 the time that red phosphorous was added to the List I chemicals, she is not entitled
7 to relief regarding her claim that she was forced to plead guilty to a charge that did
8 not exist.

9 Defendant also argues that she was sentenced greater than the maximum
10 sentence. Defendant's argument confuses the advisory guideline sentence with the
11 statutory maximum sentence. It is true that the Guidelines provided a sentence of
12 less than 108 months, without the 16-level upward departure. The statutory
13 maximum sentence, however, is 20 years. *Apprendi v. New Jersey* held that
14 "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a
15 crime beyond the *prescribed statutory maximum* must be submitted to a jury and
16 proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000) (emphasis added).
17 Because Defendant was sentenced below the prescribed statutory maximum, there
18 is no constitutional violation.

19 **B. Ineffective Assistance of Counsel**

20 Defendant asserts that she was denied effective assistance of counsel. She
21 states that her counsel was unprofessional and never presented mitigating evidence.
22 She also states there was a serious breakdown in communication. She asserts that
23 she was mislead by her counsel when she plead guilty. Defendant argues that by
24 pleading guilty, she was exposed to a 16-level upward departure, where as if she
25 had not plead guilty, she would have only been subjected to an 8-level upward
26 departure. Plaintiff also argues that she requested and verbalized to counsel
27 multiple times to file certain pleadings.

1 The Sixth Amendment of the United States Constitution guarantees the right
2 of defendants to effective assistance of counsel.³ U.S. Const. Amend. VI; *United*
3 *States v. Shwayder*, 312 F.3d 1109, 1117 (9th Cir. 2002). To show a deprivation of
4 the Sixth Amendment right to counsel, Defendant must establish that his lawyer's
5 performance was deficient and that the deficient performance prejudiced his
6 defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Mancuso v.*
7 *Olivarez*, 292 F.3d 939, 953-54 (9th Cir. 2002). There is a strong presumption that
8 an attorney's conduct "falls within the wide range of reasonable professional
9 assistance." *Strickland*, 466 U.S. at 689. Likewise, an attorney's trial tactics are
10 presumed to be "sound trial strategy." *Id.*

11 A "deficient" performance is one that is not reasonably effective, where an
12 objective standard guides judgments of reasonableness. *Id.* at 687-88. To satisfy
13 *Strickland's* first prong, the acts or omissions must fall "outside the wide range of
14 professionally competent assistance." *Id.* at 690. Defendant must show "that
15 counsel made errors so serious that counsel was not functioning as the 'counsel'
16 guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

17 A deficient performance prejudices a defense if there is "a reasonable
18 probability that, but for counsel's unprofessional errors, the result of the
19 proceeding would have been different." *Id.* at 694. "A reasonable probability is a

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21 ³In all criminal prosecutions, the accused shall enjoy the right to a speedy
22 and public trial, by an impartial jury of the State and district wherein the crime
23 shall have been committed, which district shall have been previously ascertained
24 by law, and to be informed of the nature and cause of the accusation; to be
25 confronted with the witnesses against him; to have compulsory process for
26 obtaining witnesses in his favor, and to have the Assistance of Counsel for his
27 defence. U.S. Const. Amend VI.

1 probability sufficient to undermine confidence in the outcome.” *Id.* Thus,
2 *Strickland*’s second prong “requires showing that counsel’s errors were so serious
3 as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at
4 687.

5 Defendant has failed to show that her counsel’s performance was deficient.
6 Defendant asserts that her counsel failed to present mitigating evidence. This is
7 not true. Her counsel submitted Objections to the Presentence Report and Motion
8 for Downward Departure, and the transcript of the sentencing hearing reflects that
9 Ms. Hunt zealously represented Defendant’s case.

10 Moreover, Defendant’s argument that she was misled into entering into the
11 plea also fails. The plea agreement, which was signed by Defendant, did not set
12 forth a specific recommendation as to the applicable base offense level. Both
13 parties reserved the right to argue their respective positions with regard to the base
14 offense level. The plea agreement also anticipated that the parties would be
15 seeking departures. The plea agreement specifically states that the Court did not
16 have to accept any of the parties’ sentencing recommendations. Defendant’s
17 argument that she would have received only an eight level upward departure if she
18 had not plead is misplaced. By pleading guilty, Defendant received a three-point
19 reduction that she would not have received if she had gone to trial.

20 Also, any upward departure was at the sole discretion of the Court. There
21 was nothing Defendant’s counsel could have done that could have guaranteed
22 Defendant receive a specific upward departure, other than to ask the Court to
23 accept the plea as a Fed. R. Crim. P. 11(c)(1)(c) plea, although there was no
24 guarantee that the Court would have accepted such a plea. Even so, Defendant is
25 not necessarily making this argument. Instead, Defendant is arguing that she
26 would not have entered into the plea, but for being misled by her counsel. There
27 is no evidence in the record that Defendant was misled, since the plea agreement
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1 did not address any specific terms regarding any upward or downward departures.

2 Defendant argues that Ms. Hunt was ineffective because Defendant and her
3 mother repeatedly asked Ms. Hunt to file motions based on *United States v.*
4 *Booker*, *United States v. Ameline*, and *United States v. Kortgaard*. As set forth
5 above, Defendant's appeal was filed prior to the issuance of these orders.
6 Defendant's Sixth Amendment right to counsel was met by the filing of her appeal.
7 Ms. Hunt was under no constitutional obligation to file these additional motions,
8 notwithstanding the fact that she sought and received permission from the Court to
9 file a § 2255 on behalf of Defendant.

10 Defendant is not entitled to relief on her claim of ineffective assistance of
11 counsel.

12 **C. Motion for Appointment of Counsel**

13 Appointment of counsel to represent a petitioner in an action pursuant to 28
14 U.S.C. § 2255 is discretionary with the Court. 18 U.S.C. § 3006A(2)(b). The
15 Court is permitted to appoint counsel for an indigent petitioner when the interests
16 of justice so require. *Id.* The purpose of section 3006A is "to provide for
17 appointed counsel whenever required by the constitution." *Knaubert v. Goldsmith*,
18 791 F.2d 722, 728 (9th Cir. 1986). A habeas corpus petitioner, however, has no
19 Sixth Amendment right to appointment of counsel. *Id.*

20 It does not appear to the Court that the legal issues in this case are so
21 complex that petitioner cannot present them *pro se*. The Court finds that petitioner
22 has shown an adequate ability to articulate her claims without this Court taking the
23 extraordinary step of appointing counsel to represent her.

24 Accordingly, **IT IS HEREBY ORDERED:**

25 1. Defendant's Amended Motion to Vacate Sentence Under 28 U.S.C. §
26 2255 (Ct. Rec. 63) is **DISMISSED**.

27 2. Defendant's Motion to Appoint Counsel in 28 U.S.C. § 2255 Petition
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(Ct. Rec. 64) is **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, provide copies to Defendant and counsel, and close the file.

DATED this 8th day of December, 2006.

s/ Robert H. Whaley

ROBERT H. WHALEY
Chief United States District Judge

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